(3)

No. 89-1717

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA, PETITIONER

v.

TERRANCE BOSTICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether two police officers violated the Fourth Amendment when they boarded an interstate bus during a scheduled stop and, without particularized suspicion but also without any coercion or show of force, asked respondent questions and obtained permission to search his luggage.

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INTEREST OF THE UNITED STATES

Federal law enforcement officers routinely approach individuals to ask questions, either because they suspect the individuals may be engaged in criminal activity or because they hope the individuals may be able to assist them in investigations of others. In the course of such encounters, the officers sometimes seek permission to examine the individuals' clothing or luggage. In such cases, the question frequently arises whether a seizure has occurred at any point in the encounter. The Court's disposition of this case may help answer that question in some of the typical settings in which it arises.

More specifically, the federal government has brought a number of prosecutions resulting from consent searches similar to the one in this case. Some of those prosecutions have resulted in rulings upholding the practice, see *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990); *United States* v. *Hammock*, 860 F.2d 390 (11th Cir. 1988), while others are still in litigation, see *e.g.*, *United States* v. *Lewis*, No. 90-3029 (D.C. Cir.) (appeal pending); *United States* v. *Madison*, No. 90-1545 (2d Cir.) (appeal pending). This case will affect those pending cases and will provide direction for federal officers who participate in drug surveillance programs at airports, train stations, and bus depots. This case will also affect federal prosecutions in which evidence was obtained by local police engaging in similar police-citizen encounters.

STATEMENT

1. Respondent Terrance Bostick boarded a Greyhound bus in Miami on the morning of August 27, 1985. He was bound for Atlanta. J.A. 8, 33. When the bus made a scheduled stop in Fort Lauderdale, two Broward County police officers, Joseph Nutt and Steven Rubino, got on the bus. J.A. 26. They were dressed in plain clothes, but wore windbreakers with Sheriff's Department insignia on them. J.A. 8, 21. One officer had concealed his weapon completely, while the other officer carried his weapon in a black, hand-held pouch. J.A. 13, 21, 36-37. At a suppression hearing, the officers testified that they regularly boarded buses in Fort Lauderdale and sought permission to search for drugs. J.A. 12, 29. They had no particular reason to suspect that respondent or anyone else on the bus was carrying illegal drugs. J.A. 12.

Pursuant to their standard procedure, the two officers walked to the back of the bus. They planned to talk first to passengers in the rear of the bus and then, as time permitted, to work their way toward the front of the bus. J.A. 31. The officers first approached respondent, who was stretched across three seats at the very back of the bus, resting on a red bag. Officer Nutt showed respondent his badge and, in a conversational tone, asked if respondent had a minute to speak to them. J.A. 8-10, 23, 43. Respondent agreed to do so and, upon request, showed Officer Nutt his ticket to Atlanta and his Florida driver's license. J.A. 9, 15, 29. Officer Nutt returned the ticket and the license and then asked if he could search respondent's bags for drugs. Respondent gave him the red bag and Officer Nutt looked through it but did not find any drugs. Officer Rubino then asked respondent if a blue suitcase in the overhead rack was his. Respondent said that it was, and Officer Nutt asked if he could search it. J.A. 9-10, 15-16. Officer Nutt told respondent he had the right to refuse to give his consent to the search, but respondent said, "Go ahead." J.A. 19. Officer Nutt then searched the suitcase and found a large quantity of cocaine inside it. Respondent was then arrested. J.A. 9-10.[1]

The trial court denied respondent's motion to suppress the cocaine. J.A. 1. Although the court wrote

[1] Respondent admitted that he gave Officer Nutt permission to search the red bag, which actually belonged to another passenger on the bus. J.A. 35-36. Respondent testified, however, that when he was asked for permission to search the blue suitcase, he "didn't quote anything." J.A. 36. He added that he had been arrested in the past and that, based on what he had learned from those experiences, he would never voluntarily consent to the search of a bag that contained drugs. J.A. 37.

no opinion and made no express findings of fact, the court noted that the record contained "sworn testimony from two police officers" and stated that "you have to go along with the sworn testimony." J.A. 48. The court added that "the police do have a right * * * the police can step on a bus and walk up and talk to somebody and say, can we check your bag[?]". *Ibid.* Respondent then pleaded guilty to trafficking in cocaine and was sentenced to five years' imprisonment. R. 106.

The district court of appeal affirmed without opinion, with one judge dissenting. Pet. App. B1-B6. On rehearing, however, the court certified the following question to the Florida Supreme Court: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?" *Id.* at B1-B2.

2. The Florida Supreme Court rephrased the question to read: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?" Pet. App. A1. By a four-to-three vote, the court "answer[ed] the certified question in the affirmative" and reversed. *Id.* at A1-A15. The court accepted and quoted from the statement of facts as recited in the dissenting opinion in the district court of appeal. *Id.* at A2. The quoted portion of that opinion noted that there was "a conflict in the evidence about whether [respondent] consented to the search of the second bag in which the contraband was found and whether he was informed of his right to

refuse consent," but ruled that "any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge." *Id.* at A2, B3.

On the merits of the Fourth Amendment issue, the court acknowledged that "neither the state nor federal constitutions are offended when agents of the state approach an individual on the street or in another public place, ask questions without intimidation, and offer the *voluntary* answers to those questions into evidence in a criminal prosecution." *Id.* at A6 (emphasis in original). The court did not, however, accept the State's argument that what preceded respondent's arrest "was a consensual encounter meeting all the criteria for voluntariness prescribed under *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)." Pet. App. A6. Instead, the court concluded "first, that [respondent] in fact was 'seized' by the officers and, second, that any consent he gave to search his luggage was not free from the taint of the illegal detention." *Id.* at A7.

In support of those conclusions, the court noted that it had "no doubt that the Sheriff's Department's standard procedure of 'working the buses' is an investigative practice implicating the protections against unreasonable seizures of the person." Pet. App. A7. The court then stated that, under this Court's decisions in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988), and *United States* v. *Mendenhall*, 446 U.S. 544 (1980), the question whether respondent had been seized within the meaning of the Fourth Amendment depended on whether "a reasonable traveler would not have felt that he was 'free to leave' or that he was 'free to disregard the questions and walk away.'" Pet. App. A8. Noting that respondent "could not leave the bus, which was soon to depart" and that

"the officers partially blocked the aisle and * * * one appeared to carry a gun," the court held that respondent had been seized. *Ibid.* Since the officers conceded that they "lacked any basis for suspecting illegal activity," *id.* at A9, and since even a temporary seizure must be justified by reasonable suspicion, see *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989), the court held that respondent's detention was "unlawful and unjustified," Pet. App. A9. The court added that respondent's "subsequent consent to search his luggage" did not "overc[o]me the taint of the illegal police conduct" because there had been no clear break in the chain of events leading from the seizure to the consent. *Id.* at A9-A10.

The dissenters stated that "the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances." Pet. App. A13 (Grimes, J., dissenting). They stated that in their view the police may board a bus with the permission of the operator and ask questions of anyone who is willing to listen. *Id.* at A14. While the dissenters conceded that under some circumstances the police might so intimidate a passenger that a subsequent search could not be deemed consensual, they saw no basis in this case to overturn the trial court's finding "that the consent to search had been voluntarily given." *Id.* at A15 (Grimes, J., dissenting); see also *id.* at A12 (McDonald, J., dissenting).

SUMMARY OF ARGUMENT

Law enforcement officers do not violate the Fourth Amendment by initiating consensual encounters. "Only when the officer, by means of physical force or show of authority, has in some way restrained the

liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). In a series of cases arising at airports, this Court has made clear that even if officers lack any suspicion of a particular individual, they may generally ask questions of that individual, ask to examine his identification, and request consent to search his luggage, as long as they do not suggest that compliance with their requests is required. The test the Court has used to distinguish a seizure from a consensual encounter is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)).

Under those principles, it is clear that the police officers' encounter with respondent would have been entirely lawful if the encounter had occurred in the lobby of the bus station. The record in this case shows that the officers spoke in conversational tones, did not display their weapons, and did not restrain respondent in any way or otherwise suggest that compliance with their requests was required. In the absence of any indication that respondent was not free to choose whether to cooperate with the officers, he was not seized merely because the officers asked him some questions. Moreover, the officers advised respondent that he could refuse to allow them to search his suitcase. In those circumstances, the trial court was correct in concluding that respondent's will had not been overborne and that his consent was voluntary.

The Florida Supreme Court based its decision principally on its conclusion that a reasonable person in

respondent's position would not think that he was "free to leave," because he "had only the confines of the bus to move about." Pet. App. A8. That proposition is legally flawed. First, the officers did not restrain respondent and compel him to remain in his seat where they could talk with him. Nothing in the version of the facts accepted by the Florida Supreme Court suggests that the officers used physical force or a show of authority to coerce respondent into speaking with them and consenting to the search of his luggage. Second, the bus was about to leave Fort Lauderdale with respondent aboard; respondent knew that if the officers did not take some action to remove him from the bus, he would shortly be on his way to his destination. Respondent's position was therefore not even as difficult as that of a person who is approached by police in an airport terminal. That person must walk away from the police to terminate the encounter. All respondent had to do was stay in his seat, decline to talk with the officers, and wait for the bus to depart.

In any event, the Florida Supreme Court misapplied this Court's test for distinguishing between encounters and seizures by erroneously focusing on the question whether a person in respondent's position, who wished to continue his journey, would have felt "free to leave" the bus. Leaving the bus was not the only way respondent could have declined to cooperate with the officers; he could simply have told them he did not wish to speak with them or that he did not wish to consent to a search of his luggage, as they had advised him he could. In this setting, then, the court's focus should have been on whether a reasonable person would think that he could terminate the conversation. And on that issue, the dissenting judges below were correct. Nothing about the facts

of this case—including the fact that respondent was sitting on a bus—would have caused a reasonable person to believe that he could not say no to the officers' requests.

In holding that respondent had been seized, the Florida Supreme Court relied in part on the fact that the encounter in this case was part of the Sheriff's Department's regular practice of "working the buses." Pet. App. A7. There is, however, no legal basis for the proposition that a police-citizen encounter that occurs as a result of happenstance or an officer's on-the-spot decision is not a seizure, but that the same encounter is transformed into a seizure if it takes place pursuant to a regular police practice.

There is no validity to the "police state" specter raised by the Florida Supreme Court. The officers could not insist that respondent or anyone else on the bus cooperate with them, although the passengers were free to cooperate if they chose. Moreover, law enforcement officers may not even suggest in cases such as this that compliance with their requests is mandatory, nor may they use the fact of noncompliance to justify a seizure. Therefore, to say that the Fourth Amendment is not implicated in this case does not give the police license to engage in intimidating and coercive practices that will invade the privacy of unwilling citizens.

ARGUMENT

THE POLICE OFFICERS DID NOT SEIZE RESPONDENT BY ASKING HIM QUESTIONS AND OBTAINING PERMISSION TO SEARCH HIS LUGGAGE

Because the police officers had no reason to suspect that respondent was carrying illegal drugs, they would not have been justified in demanding that he respond to their questions or submit to a search. But the police made no such demands in this case, either explicitly or implicitly. To the contrary, they merely approached respondent, asked him some questions, and sought permission to search his luggage. In those circumstances, a reasonable person would have felt free either to decline to speak to the officers or to consent to a search. Accordingly, the Fourth Amendment was not violated by this consensual encounter.[2]

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[2] Analysis of this case is complicated by the failure of the trial court to make findings of fact. The trial court appears to have credited the testimony of the two police officers, see J.A. 48, and the two appellate courts accepted the State's version of the facts bearing on whether respondent consented to the search and whether the officers advised respondent of his right to refuse consent, see Pet. App. A2, B6. The state courts, however, did not expressly resolve other factual questions that bear on the issue before the Court. To be sure, the ultimate question whether a seizure took place is an issue of law. See *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (opinion of Stewart, J.) (describing circumstances in the absence of which "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person"); *United States* v. *Maragh*, 894 F.2d 415, 417-418 (D.C. Cir. 1990). But the resolution of that issue will often turn on factual questions on which the trial court's findings are entitled to great deference. We have specifically noted those factual issues not expressly resolved by the state courts, and we have relied on evidence on those issues only where it is uncontradicted.

A. Law Enforcement Officers Do Not Need Reasonable Suspicion To Ask Questions And To Seek Permission To Conduct A Search

1. In *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), the Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Thus, the Fourth Amendment is not implicated by consensual encounters.

Under the Fourth Amendment, a law enforcement officer must have a "reasonable suspicion" that a person was engaged in wrongdoing in order to stop him and require him to respond to questioning. *Terry* v. *Ohio*, 392 U.S. at 27; *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989). And for an arrest, the Fourth Amendment requires that an officer have probable cause to believe that the person committed a crime. *Terry*, 392 U.S. at 26. But there is "nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry*, 392 U.S. at 34 (White, J., concurring). On the contrary, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion).

This Court has addressed a number of situations presenting the question whether—and, if so, when—a defendant has been seized during a discussion with law enforcement officers. The test developed by this

Court to distinguish seizures from consensual encounters is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Thus, a seizure occurs at the point that a reasonable person would think that he was not free to terminate a conversation and go about his business.

This Court has on three occasions addressed the question whether a police-citizen encounter at an airport constituted a "seizure" for Fourth Amendment purposes. In *United States* v. *Mendenhall*, *supra*, two justices concluded that the defendant had not been seized when two DEA agents approached her, inspected her ticket and identification, returned them, and obtained her permission to accompany them to the airport DEA office, where she allowed them to search her luggage. 446 U.S. at 555 (opinion of Stewart, J.).[3]

In *Florida* v. *Royer*, *supra*, the Court concluded that an encounter that began like the encounter in *Mendenhall* escalated into a seizure when two detectives retained the defendant's ticket and identification, informed him that they suspected him of transporting narcotics, and asked him to accompany them to a room the size of a large storage closet, where they searched his luggage. 460 U.S. at 494, 503

[3] Justice Rehnquist joined Justice Stewart's opinion. Three other justices noted that they did not necessarily disagree with Justice Stewart's conclusion that no seizure had occurred, but they found it unnecessary to reach the issue because they concluded that the agents had reasonable suspicion to stop the defendant. 446 U.S. at 560 & n.1 (Powell, J., concurring).

(plurality opinion). But a majority of the Court agreed that approaching the defendant and "[a]sking for and examining [his] ticket were no doubt permissible in themselves." *Id.* at 501; see *id.* at 523 n.3 (Rehnquist, J., dissenting) ("I also agree with the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked.").

In *Florida* v. *Rodriguez*, 469 U.S. 1 (1984), the Court confirmed that police who approach a person in an airport may ask questions of the person without intruding on an interest protected by the Fourth Amendment. The Court held that "[t]he initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest." 469 U.S. at 5-6.[4]

These three "airport" cases have shed considerable light on the kinds of circumstances that may convert an encounter into a seizure. Certain circumstances "might indicate a seizure, even where the person did not attempt to leave [such as] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 554 (opinion of Stewart, J.); see *United States* v *Sokolow*, 109 S. Ct. at 1584-

[4] In addition to *Mendenhall*, *Royer*, and *Rodriguez*, the Court has decided three other "airport encounter" cases, *United States* v. *Sokolow*, *supra*, *United States* v. *Place*, 462 U.S. 696 (1983), and *Reid* v. *Georgia*, 448 U.S. 438 (1980), but in none of those cases did the Court discuss the question whether a seizure occurred.

1585 (where DEA agents "grabbed respondent by the arm and moved him back onto the sidewalk," the Court assumed that a seizure had occurred); *United States* v. *Lee*, No. 89-1608 (2d Cir. Oct. 17, 1990), slip op. 6972. On the other hand, "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person." 446 U.S. at 555 (opinion of Stewart, J.); *Florida* v. *Rodriguez*, *supra*.

2. The fact that a defendant acts unwisely in consenting to a search does not mean that he was seized prior to the search. In *Mendenhall*, Justice Stewart "reject[ed] the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions." 446 U.S. at 555. No member of the Court has disagreed with that conclusion. To the contrary, in *Florida* v. *Royer*, 460 U.S. at 519 n.4 (dissenting opinion), Justice Blackmun noted that "[t]he fact that Royer knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in Royer's position."

Thus, as Professor LaFave has stated, the police, "without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed 'to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should.'" 3 W. LaFave, *Search and Seizure* § 9.2(h), at 411 (1987 ed.) (quoting Model Code of Pre-Arraignment Procedure 258

(1975)).[5] That conclusion flows naturally from the rule that "a search conducted pursuant to a valid consent is constitutionally permissible" and the fact that "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222, 243 (1973). Since "[a] person placed in official custody is not thereby rendered incapable of giving his free and voluntary consent to a warrantless search" (*United States* v. *Moreno*, 897 F.2d 26, 33 (2d Cir.), cert. denied, 110 S. Ct. 3250 (1990)), there is no reason why a person who is merely approached by law enforcement officers cannot do so.

To be sure, a police request for permission to search luggage puts a drug courier in a difficult position. An innocent person is likely to consent to a request by the police, at least if the request is not unduly burdensome or humiliating. See *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). A drug courier is therefore likely to "'cooperate' in the hopes of simulating the reasonable innocent person and thereby shaking the police." *United States* v. *Tavolacci*, 895 F.2d 1423, 1424 (D.C. Cir. 1990). But the fact that the simulation does not throw the police off does not vitiate the voluntariness of the consent. Consent that is given

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[5] The District of Columbia Circuit made the same point in *Gomez* v. *Turner*, 672 F.2d 134, 142 (1982):

> Because a variety of factors may contribute to a person's decision to acquiesce to an officer's request, we are unwilling to impute to the reasonable person, as his sole motivation, a fear of official sanction engendered by the mere presence of an authority figure. * * * There must be some additional conduct by the officer to overcome the presumption that a reasonable person is willing to cooperate with a law enforcement officer.

foolishly may nevertheless be given freely. What matters is whether, in light of all the circumstances, the defendant's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. at 225, 226.[6]

B. The Police Officers Did Not Seize Respondent By Questioning Him On A Bus

1. It is clear that the fruits of the search in this case would be admissible if the encounter had occurred in the lobby of the Greyhound station rather than on the bus itself. See *Florida* v. *Royer*, 460 U.S. at 505 ("had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Detective Johnson and any evidence recovered would have been admissible against him") (plurality opinion); *United States* v. *Tavolacci*, 895 F.2d at 1425; *United States* v. *Winston*, 892 F.2d 112 (D.C. Cir. 1989); *United States* v. *Baskin*, 886 F.2d 383 (D.C. Cir. 1989). Questioning in the lobby would be permissible because this Court's decisions make clear that law enforcement officers are free to approach people and ask to speak with them. *Florida*

[6] In some cases, travelers who are asked for permission to search particular luggage deny that the luggage belongs to them. When no one else claims the luggage, it may be considered abandoned and the police may open it. For example, in *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990), a bus passenger denied ownership of the luggage on the bin over his head. When the police subsequently opened it, they found a large quantity of crack cocaine, a pistol, and the passenger's wallet. *Id.* at 709. See also *United States* v. *Lee*, slip op. 6968-6969; *United States* v. *Carrasquillo*, 877 F.2d 73, 75 (D.C. Cir. 1989).

v. *Rodriguez*, 469 U.S. at 5-6. Similarly, an officer may ask to inspect a passenger's ticket and identification, and no seizure occurs as long as the officer promptly returns the documents. *Florida* v. *Royer*, 460 U.S. at 503 (plurality opinion); *id.* at 523 n.3 (dissenting opinion). And there is no question that a person may consent to a search in the course of such an encounter. *United States* v. *Mendenhall*, 446 U.S. at 558-559; *Schneckloth* v. *Bustamonte*, 412 U.S. at 222.

The fact that the events in this case occurred aboard a bus does not change the constitutional analysis. Respondent was not confronted by the threatening presence of several officers speaking in commanding tones and blocking his exit or requiring him to move to an interview room. Instead, respondent was approached by two officers who spoke in conversational tones, who did not force him to move, and who stood in a manner that did not block his access to the aisle. J.A. 8-9, 11, 20-21, 23, 23-30, 39.[7] The officers

[7] The Florida Supreme Court stated that "Officer Nutt stood in a position that partially blocked the only possible exit from the bus." Pet. App. A8. That statement seems to acknowledge that respondent's path was not completely blocked, and the undisputed evidence at the suppression hearing was that the officers stood in a way that did not block respondent's path out of the bus. J.A. 11, 23, 39. Other court decisions indicate that the procedure followed by officers in Broward County is to stand slightly behind passengers so as not to block them from going to the front of the bus if they choose. See *United States* v. *Hammock*, 860 F.2d at 392 (Broward County officers "remained slightly behind appellant's seat so that the aisle was clear for him to leave the bus, if he should have wanted to do so"); *United States* v. *Rembert*, 694 F. Supp. 163, 169 (W.D.N.C. 1988) (North Carolina officers

did not display their weapons, and respondent testified that he never saw a gun. J.A. 39.[8] The only suggestion of any physical contact between the officers and respondent was respondent's statement that he had been sleeping and that Officer Nutt "tapped me * * * [and] asked me did I have a bus ticket." J.A. 40-41.[9] Respondent did not attempt to leave the bus, to leave his seat to go to the nearby bathroom, or to terminate the conversation, and the officers did nothing to suggest that he was not free to do any of those

trained by Broward County Sheriff's Department "positioned themselves in the aisle to the rear of Rembert's seat and did not block his access to the aisle"). Obviously, it is not possible to stand completely behind a person who, like respondent, is seated at the very rear of a bus.

[8] The Florida Supreme Court noted that respondent testified "that Officer Nutt had his hand in a black pouch that appeared to contain a gun." Pet. App. A8. Even if the court had credited respondent's testimony, that testimony reflects only that respondent suspected Officer Nutt was carrying a weapon. There is a significant difference between an officer's carrying a weapon and displaying it during an encounter. It is widely understood that law enforcement officers often carry weapons but seldom use them. It is only a show of authority or some other actual restraint that matters for Fourth Amendment purposes, not the mere potential for such a show of authority. *Terry* v. *Ohio*, 392 U.S. at 19 n.16; *United States* v. *Winston*, 892 F.2d at 115. Moreover, while Officer Nutt testified that it was possible that he had his hand in his bag, he also stated that his normal practice was to keep the bag zipped. J.A. 13-14. Officer Rubino confirmed that he had never seen Officer Nutt unzip his pouch or put his hand in it while questioning a person on a bus. J.A. 27.

[9] Officer Nutt's recollection was that respondent was merely resting, not sleeping, and that he responded when the officer introduced himself. J.A. 14. Officer Rubino also recalled that respondent had been resting, not sleeping. J.A. 27-28.

things.[10] J.A. 17, 23. Nor did the officers tell respondent that they suspected him of carrying drugs.[11]

The record also supports the trial court's conclusion that respondent voluntarily consented to the search. "Voluntariness is a question of fact to be determined from all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. at 248-249. In this case, the trial court credited the officers' testimony that respondent consented. J.A. 48. There is nothing in the record to suggest that respondent's "will ha[d] been overborne and his capacity for self-determination critically impaired." See *Schneckloth* v. *Bustamonte*, 412 U.S. at 225. On the contrary, Officer Nutt testified that he advised respondent that he had the right to refuse to give his consent to the search of the blue suitcase containing the cocaine, but that respondent

[10] In a deposition given in connection with the suppression motion, the bus driver testified that he closed the door and left the bus after the officers arrived. The driver explained that he routinely shut the bus door whenever he left the bus during a station stop so that unauthorized persons could not board the bus without a ticket. J.A. 52, 54. There was no suggestion in the record that a passenger who decided to leave could not simply reopen the door and walk off the bus.

[11] Such a statement, in combination with other factors, might contribute to a person's reasonable belief that he is not free to leave. See *Florida* v. *Royer*, 460 U.S. at 496 (plurality opinion); *United States* v. *Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988). We do not believe, however, that such a statement, standing alone, is likely to have such an effect. See *United States* v. *Lee*, slip op. 6973 ("The only factor that might arguably be construed as an indication that Lee was not free to leave was Officer Niczyporowicz's statement that Lee was suspected of carrying contraband. However, we are unconvinced that this single statement transformed an otherwise consensual encounter into a fourth amendment seizure.").

consented in spite of that advice. J.A. 19.[12] While this Court has held that such advice is not required, *Schneckloth* v. *Bustamonte*, 412 U.S. at 227-234, it has recognized that "the subject's knowledge of a right to refuse is a factor to be taken into account" in determining the voluntariness of consent to a search, *id.* at 249; see also *United States* v. *Mendenhall*, 446 U.S. at 558-559.

2. The Florida Supreme Court concluded that respondent was seized because he was not "free to leave" the bus and escape the officers' presence. "Because respondent was enroute to Atlanta," the court wrote, "he could not leave the bus, which was soon to depart"; for that reason, the court concluded, respondent was seized because he "had only the confines of the bus to move about." Pet. App. A8.

As an initial matter, the fact that respondent could have moved from his seat showed that he was "free to leave." He could have told the officers that he did not want to talk to them and walked down the aisle or into the bathroom on the bus if he wished to distance himself from the officers. If the officers had blocked his way or otherwise prevented him from walking away from them, their conduct clearly would have constituted a seizure for Fourth Amendment purposes. But nothing about the officers' manner, as revealed by the evidence in this case, would have caused a reasonable person to think he was not free to leave. To the extent that a reasonable person would not have felt free to leave the bus, that was

[12] The officers advised respondent that they were narcotics agents and that their job was to "contact the traveling public and ask for permission to do a consent check of bags for drugs." J.A. 22.

not because of the officers' conduct, but because the bus was soon to depart.[13]

The fact that the bus was about to depart actually made the encounter in this case *less* coercive than it might otherwise have been. Since the bus was about to leave Fort Lauderdale with respondent aboard, he did not have to take any action in order to continue his journey without any further interference from the Fort Lauderdale police officers. Unlike a person in a bus or airline terminal who must take the affirmative step of walking away from police officers, respondent did not have to take any affirmative measures in order to be on his way.

For that reason, the Florida Supreme Court erred when it focused exclusively on whether respondent was "free to leave" rather than on the principle that those words were intended to capture. As the dissenters in that court recognized, determining whether a person reasonably feels free to leave is just one way of answering the more basic question, *i.e.*, "whether a reasonable person would have felt free to terminate

[13] To the extent that the setting of the encounter was restrictive, that factor alone is not enough to amount to coercion, particularly when the citizen has voluntarily placed himself in that restrictive environment. In *INS* v. *Delgado*, *supra*, the respondents argued that immigration officials positioned at the exits of a factory made the interviews of employees inside inherently coercive. This Court answered that argument by pointing out that "when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." 466 U.S. at 218. So here, where respondent was on the bus by his own choice, any restriction on his movement was due to his own desire to remain on the bus and go on with his journey, not to any action on the part of the police. *United States* v. *Flowers*, 912 F.2d at 711-712.

the encounter, given the totality of the circumstances." Pet. App. A13.

In any case in which the person is on the move when the encounter begins, it is sensible to inquire whether the person reasonably feels free to continue on his way by walking away from the officers. But when the person is seated and has no desire to leave, the degree of the person's freedom to leave is not necessarily the most appropriate measure of the coercive effect of the encounter. Leaving the bus was not the only way respondent could have expressed his unwillingness to cooperate with the officers, nor was it even the most natural way. He could simply have told them he did not wish to speak with them or to consent to a search of his luggage, as they had advised him he could. Indeed, it would normally be easier for a person just to tell the officers he did not want to talk to them than for him to get up and walk away.

Absent some basis for further investigative action, officers who encounter such a person must comply with the person's wishes. As the Fourth Circuit stated in another case arising from a bus encounter, "[i]n this context, freedom to leave means fundamentally the freedom to break off contact, in which case officers must, in the absence of objective justification, leave a passenger alone." *United States* v. *Flowers*, *supra*, 912 F.2d at 712.

3. The Florida Supreme Court stated that " 'working the buses' is an investigative practice implicating the protections against unreasonable seizures of the person" (Pet. App. A7). That observation suggests that the court believed respondent was "seized" either because the encounter with the officers did not occur by chance or because the officers had "seized" the entire bus. Neither point has any merit

in light of *INS* v. *Delgado*, *supra*. That case involved a "factory survey," during which a team of INS agents entered a workplace and "[m]oving systematically through the factory, * * * approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship." 466 U.S. at 212. Based on the answers, the agents would either move on or ask to see the employees' immigration papers. *Id.* at 213. The Court concluded that the plaintiffs had not been seized on account of the questioning, even though the questioning was conducted pursuant to a plan.[14]

In *Delgado*, the Court also rejected the argument that the entire factory and everyone in it had been seized by the "factory survey" operation, an argument based largely on the fact that INS agents were stationed by the factory doors. 466 U.S. at 217. In light of that holding, no credible argument can be made in this case that the bus was seized when Officers Nutt and Rubino entered it. The officers placed no guards by the exit, and the officers were careful not to block the aisle. J.A. 11, 21, 23. Pursuant to their standard procedure, they started questioning passengers at the rear of the bus. J.A. 31. Thus, any passenger other than respondent could have walked to the front of the bus without even passing the officers. As in *Delgado* (466 U.S. at 213), the passengers were all free to go about their business

[14] See also *United States* v. *Johnson*, 910 F.2d 1506, 1509 (7th Cir. 1990) ("Johnson argues this was a 'seizure' within the meaning of the Fourth Amendment because the police made a 'predetermination' to stop her based on her resemblance to the drug courier profile. * * * Of course the officers planned to speak with her because of the drug courier profile; nevertheless, their actions did not restrain her liberty in any way.").

on or off the bus while the officers talked to other passengers.[15]

The two federal courts of appeals that have considered bus encounters like the one in this case have held that such encounters are not so inherently coercive as to constitute Fourth Amendment seizures. See *United States* v. *Flowers*, 912 F.2d 707 (4th Cir. 1990); *United States* v. *Hammock*, 860 F.2d 390 (11th Cir. 1988).[16] Both courts recognized that the law enforcement officers who arrested the defendants in those cases routinely boarded buses and sought cooperation from passengers. *Flowers*, 912 F.2d at 710 (the arresting officer had "boarded approximately one hundred buses, resulting in fifteen seizures of bags containing illegal drugs"); *Hammock*, 860 F.2d at 391 ("[f]ollowing their usual procedure, the detectives went to the rear of the bus and began to work their way forward"). Those courts correctly held that the Fourth Amendment is not violated merely because law enforcement officers board a bus pursuant to an investigative program under which they would contact as many passengers as possible before the bus left.

4. Because law enforcement officers in this country must respect an individual's right to be left alone, the

[15] Nothing in the record suggests that the officers prevented the bus from departing. The driver was simply accommodating the officers, consistent with his normal practice. J.A. 52. The driver testified that the police check of the buses normally took five to ten minutes. J.A. 55.

[16] Other courts have upheld similar bus and train encounters. See *United States* v. *Tavolacci*, *supra* (train); *United States* v. *Carrasquillo*, *supra* (train); *United States* v. *Rembert*, 694 F. Supp. 163 (W.D.N.C. 1988) (bus); *State* v. *Turner*, 94 N.C. App. 584, 380 S.E.2d 619 (1989) (bus). Contra, *United States* v. *Lewis*, 728 F. Supp. 784 (D.D.C. 1990) (bus).

"police state" images invoked by the Florida Supreme Court (Pet. App. A11) miss the mark. As the Fourth Circuit recognized in the *Flowers* case, 912 F.2d at 712, "Flowers possessed at a minimum the right to refuse to speak with the officers, who in turn possess no right to detain citizens who decline to talk or otherwise identify themselves." 912 F.2d at 712. Moreover, it is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police. See *INS* v. *Delgado*, 466 U.S. at 216-217; *United States* v. *Mendenhall*, 446 U.S. at 554, 556 (opinion of Stewart, J.). Indeed, law enforcement officers lacking the requisite justification may not even give the *impression* that they have the right to seize a person. As Justice Stewart stated in *United States* v. *Mendenhall*, 446 U.S. at 554, a seizure may be caused by "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." When a consent to search emerges from a consensual encounter, the encounter must be truly consensual; the police must rely on the voluntary cooperation of the subject. In a police state, in contrast, law enforcement officers do not have to rely on voluntary cooperation at all.[17]

[17] In this connection, it should be noted that "the confines of the bus" (Pet. App. A8) discourage any police misconduct. That is because not only is the subject confined to the bus, but so are other passengers. Accordingly, there typically would be many possible witnesses to support a claim that law enforcement officers had spoken in commanding tones or

The test that originated in *United States* v. *Mendenhall* "allows officers to make inquiries as long as they don't throw their official weight around unduly." *United States* v. *Tavolacci*, 895 F.2d at 1425. As such, it is "a rather conventional application of the idea of reasonableness, the line actually drawn by the Fourth Amendment." *Ibid.* When "the person to whom questions are put remains free to disregard the questions and walk away" (*United States* v. *Mendenhall*, 446 U.S. at 554), it cannot be said that his freedom has been curtailed. The dissenting judges in the Florida Supreme Court properly concluded that, under that standard, respondent was not seized when the two police officers approached him on the bus and sought his voluntary cooperation.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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otherwise implied that compliance with their requests was mandatory.

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